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**United States Department of Energy  
Office of Hearings and Appeals**

In the Matter of: Personnel Security Hearing	)	
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Filing Date: May 26, 2022	)	Case No.: PSH-22-0092
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Issued: August 24, 2022

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**Administrative Judge Decision**

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Phillip Harmonick, Administrative Judge:

This Decision concerns the eligibility of XXXXXXXXXXXXXXXX (the Individual) to hold an access authorization under the United States Department of Energy's (DOE) regulations, set forth at 10 C.F.R. Part 710, "Procedures for Determining Eligibility for Access to Classified Matter and Special Nuclear Material."<sup>1</sup> As discussed below, after carefully considering the record before me in light of the relevant regulations and the *National Security Adjudicative Guidelines for Determining Eligibility for Access to Classified Information or Eligibility to Hold a Sensitive Position* (June 8, 2017) (Adjudicative Guidelines), I conclude that the Individual should not be granted access authorization.

**I. BACKGROUND**

The Individual is employed by a DOE contractor in a position that requires him to hold a security clearance. On July 8, 2021, the Individual submitted a Questionnaire for National Security Positions (QNSP) in which he disclosed that he had been arrested for Driving Under the Influence (DUI) in 2015 and 2020. Exhibit (Ex.) 6 at 30–32, 40. The Office of Personnel Management (OPM) subsequently conducted a background investigation of the Individual which revealed that he had been arrested for reckless driving in 2008, domestic assault in 2010, DUI in 2010, and DUI and associated traffic offenses in 2012. Ex. 7 at 83–90. OPM's investigation also revealed that orders of protection related to alleged domestic violence were issued against the Individual in 2010, 2012, and 2020. *Id.* at 90–96. During an interview with an OPM investigator on July 20, 2021, the Individual reported that he became intoxicated on a monthly basis after consuming approximately ten beers. *Id.* at 58, 64. He also disclosed that he was serving probation in connection with his 2020 DUI offense until September 2021. *Id.* at 64. On August 23, 2021, the

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<sup>1</sup> The regulations define access authorization as "an administrative determination that an individual is eligible for access to classified matter or is eligible for access to, or control over, special nuclear material." 10 C.F.R. § 710.5(a). This Decision will refer to such authorization as access authorization or security clearance.

Individual notified the OPM investigator that he had been arrested for DUI earlier that month. *Id.* at 67–69.

The local security office (LSO) issued the Individual a letter of interrogatory (LOI) concerning his alcohol use and alleged criminal conduct. Ex. 5. The Individual's responses to the LOI did not resolve the security concerns, and the LSO issued the Individual a letter notifying him that it possessed reliable information that created substantial doubt regarding his eligibility for access authorization. In a Summary of Security Concerns (SSC) attached to the letter, the LSO explained that the derogatory information raised security concerns under Guideline G (Alcohol Consumption) and Guideline J (Criminal Conduct) of the Adjudicative Guidelines. Ex. 1.

The Individual exercised his right to request an administrative review hearing pursuant to 10 C.F.R. Part 710. Ex. 2. The Director of the Office of Hearings and Appeals (OHA) appointed me as the Administrative Judge in this matter, and I subsequently conducted an administrative hearing. The LSO submitted seven exhibits (Ex. 1–7). The Individual submitted ten exhibits (Ex. A–J). The Individual testified on his own behalf. Hearing Transcript (Tr.) at 3, 11. The LSO did not call any witnesses to testify.

## **II. THE NOTIFICATION LETTER AND THE ASSOCIATED SECURITY CONCERNS**

The LSO cited Guideline G (Alcohol Consumption) as the first basis for its determination that the Individual was ineligible for access authorization. Ex. 1 at 1–2. “Excessive alcohol consumption often leads to the exercise of questionable judgment or the failure to control impulses, and can raise questions about an individual’s reliability and trustworthiness.” Adjudicative Guidelines at ¶ 21. The SSC cited: the Individual’s admission to consuming alcohol to intoxication on a monthly basis; the Individual’s arrests for DUI; the Individual’s citations for traffic offenses after consuming alcohol; and the Individual’s alleged acts of domestic violence after consuming alcohol. Ex. 1 at 1–2. The LSO’s assertions that the Individual was arrested for DUI, engaged in domestic violence after consuming alcohol, and habitually or binge consumed alcohol to the point of impaired judgment justify the LSO’s invocation of Guideline G. Adjudicative Guidelines at ¶ 22(a), (c).

The LSO cited Guideline J (Criminal Conduct) as the other basis for its determination that the Individual was ineligible for access authorization. Ex. 1 at 2–3. “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules, and regulations.” Adjudicative Guidelines at ¶ 30. The SSC cited: the Individual’s arrests and citations for reckless driving, domestic assault, and DUI; his violation of his probation for his 2020 DUI offense; and the orders of protection issued against him in connection with alleged incidents of domestic violence. Ex. 1 at 2–3. The LSO’s allegations that the Individual engaged in criminal conduct and violated the terms of his probation for the 2020 DUI offense justify its invocation of Guideline J. Adjudicative Guidelines at ¶ 31(b), (d).

## **III. REGULATORY STANDARDS**

A DOE administrative review proceeding under Part 710 requires me, as the Administrative Judge, to issue a Decision that reflects my comprehensive, common-sense judgment, made after consideration of all of the relevant evidence, favorable and unfavorable, as to whether the granting or continuation of a person's access authorization will not endanger the common defense and security and is clearly consistent with the national interest. 10 C.F.R. § 710.7(a). The regulatory standard implies that there is a presumption against granting or restoring a security clearance. *See Dep't of Navy v. Egan*, 484 U.S. 518, 531 (1988) ("clearly consistent with the national interest" standard for granting security clearances indicates "that security determinations should err, if they must, on the side of denials"); *Dorfmont v. Brown*, 913 F.2d 1399, 1403 (9th Cir. 1990), cert. denied, 499 U.S. 905 (1991) (strong presumption against the issuance of a security clearance).

An individual must come forward at the hearing with evidence to convince the DOE that granting or restoring access authorization "will not endanger the common defense and security and will be clearly consistent with the national interest." 10 C.F.R. § 710.27(d). An individual is afforded a full opportunity to present evidence supporting his eligibility for an access authorization. The Part 710 regulations are drafted so as to permit the introduction of a very broad range of evidence at personnel security hearings. Even appropriate hearsay evidence may be admitted. 10 C.F.R. § 710.26(h). Hence, an individual is afforded the utmost latitude in the presentation of evidence to mitigate the security concerns at issue.

#### IV. FINDINGS OF FACT

In August 2008, the Individual was cited for reckless driving. Ex. 5 at 20;<sup>2</sup> Ex. 7 at 64, 86. The Individual admitted that he consumed alcohol prior to driving his vehicle on this occasion, but denied that he was intoxicated. Ex. 5 at 20. He pleaded guilty and was sentenced to a six-month probationary period. *Id.* at 21; Ex. 7 at 86.

In February 2010, the Individual's girlfriend (Girlfriend A) filed a petition for an order of protection against the Individual based on her allegations that he had thrown her into furniture on two occasions.<sup>3</sup> Ex. 7 at 95–96. Girlfriend A subsequently withdrew the petition. *Id.* at 96. On June 26, 2010, the Individual was arrested for domestic assault based on Girlfriend A's allegations that he "came to [her] house drunk," argued with her about child support obligations, struck her, and threatened to kill her. *Id.* at 63, 84, 94; *see also* Ex. 5 at 16–17 (reflecting the Individual's admission to having consumed alcohol "3 or 4 hours before the argument" and assertion that she "falls back" [sic] after reaching into the vehicle in which the Individual was sitting during the argument). The charges were dismissed after Girlfriend A failed to appear in court. Ex. 7 at 63. Girlfriend A was granted an additional order of protection against the Individual in November

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<sup>2</sup> Due to an unnumbered page inserted by the Individual in his response to the LOI, the pagination of Exhibit 5 does not correspond to the order in which the pages appear. This Decision cites to pages in the order in which they appear without regard for their internal pagination.

<sup>3</sup> The Individual admitted during the hearing that he was first arrested for alleged domestic violence in 2006 following a domestic dispute with the mother of one of his children. Tr. at 36–37. This arrest was not cited in the SSC as a security concern. The Individual represented that the woman fell when she tried to snatch a phone out of his hand during an argument, that he had not harmed her, and that the charges were dismissed at the discretion of the prosecuting agency after he avoided any further arrests or citations for six months. *Id.* at 36–39.

2010 based on her allegations stemming from the June 2010 incident and her assertion that the Individual had physically assaulted and threatened her on other occasions. *Id.* at 94–95.

On November 6, 2010, the Individual was arrested and charged with DUI. *Id.* at 85–86. The charges associated with this arrest were reduced to reckless driving. *Id.* at 86; Tr. at 42–43.

On May 12, 2011, a court extended the order of protection against the Individual concerning Girlfriend A for one year and ordered him to attend forty-five domestic violence intervention group meetings during that period. Ex. 7 at 92. On June 7, 2012, Girlfriend A sought to further extend the order of protection. *Id.* at 91. She alleged that the Individual had threatened her over the phone, including telling her that he would kill her with a firearm he possessed if he saw her in public. *Id.* Girlfriend A’s request to extend the order of protection was denied after she failed to appear at a hearing. *Id.* at 92.

On June 9, 2012, the Individual was arrested and charged with DUI, driving on a suspended driver’s license, and other traffic offenses. *Id.* at 62–63; *see also* Ex. 5 at 6–7 (reflecting the Individual’s admission to having consumed “a couple 24oz beers over 2 or 3 hours” before operating his vehicle). He pleaded guilty, and a court ordered the suspension of his driver’s license for one year and sentenced him to a six-month probationary period. Ex. 5 at 7–8; Ex. 7 at 63.

The Individual was arrested and charged with DUI in October 2015 after a law enforcement officer observed him experiencing difficulties driving out of the parking lot of a club where he had consumed alcohol. Ex. 7 at 61, 89–90. The Individual pleaded guilty and was sentenced to forty-eight hours jail time, a one-year probationary period, community service, and revocation of his driver’s license for one year. Ex. 5 at 6; Ex. 7 at 89–90.

In January 2020, the Individual was arrested and charged with DUI. Ex. 7 at 61, 97–98. The Individual pleaded guilty and in September 2020 he was sentenced to a one-year probationary period and ordered to perform community service, undergo an alcohol evaluation, attend Alcoholics Anonymous (AA) meetings, and have an interlock device installed on his vehicle. Ex. 5 at 4; Ex. 7 at 61–62.

In December 2020, a girlfriend of the Individual (Girlfriend B) filed for an order of protection against the Individual. Ex. 7 at 91. She alleged that a September 2020 argument between them “became physical,” that she had told the Individual to leave and never contact her again following the incident, and that the Individual had contacted her against her wishes on December 8, 2020.<sup>4</sup> *Id.* The court ordered the Individual and Girlfriend B to attend a hearing concerning the matter. *Id.* On December 22, 2020, the court granted Girlfriend B’s request for an order of protection after making “a particularized finding of fact that the [Individual] grabbed [Girlfriend B] by the throat.” *Id.* The Individual was ordered to have no contact with Girlfriend B for one year and prohibited from possessing firearms. *Id.*

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<sup>4</sup> The Individual denied that he had hurt Girlfriend B and speculated that she might have been motivated to seek an order of protection if she “was with her significant other” when he sent the text messages “to make them feel better.” Tr. at 29.

On July 8, 2021, the Individual signed and submitted the QNSP. Ex. 6 at 40. On July 20, 2021, he met with the OPM investigator for an interview. Ex. 7 at 58. During the interview, the Individual indicated that he needed to consume approximately ten beers in a sitting to become intoxicated and that he consumed alcohol to intoxication on a monthly basis. *Id.* at 64. He asserted that he had “learned his lesson” from his January 2020 arrest for DUI and that “there [was] no possibility of a recurrence or continuation of this conduct in the future.” *Id.* at 62.

On August 23, 2021, the Individual notified the OPM investigator that he had been arrested on August 6, 2021, and charged with DUI and violation of probation.<sup>5</sup> *Id.* at 68. The Individual reported to the OPM investigator that his friends told him that he had consumed “two shots and a few mixed drinks” but he could “not recall any details of the night.” *Id.* The Individual was placed on supervised pre-trial release following his arrest. Ex. I. The Individual is subject to drug and alcohol screenings pursuant to his pre-trial release, but has only been tested on two occasions: on August 20, 2021, shortly after his monitoring began, and in August 2022, approximately two weeks prior to the hearing. Tr. at 24; Ex. E; Ex. F. The Individual will remain on pre-trial release until his next court appearance in December 2022, at which time the prosecuting agency will stipulate to the dismissal of the charges provided that the Individual is not charged with any additional offenses and attends counseling and AA. Ex. H.

The Individual enrolled in an intensive outpatient program (IOP) for alcohol treatment in September 2021 which he successfully completed on November 1, 2021. Ex. A; Ex. 5 at 13. According to the Individual, the IOP taught him facts about the science of addiction and helped him to identify elements of his personal history that may have contributed to his alcohol misuse. Tr. at 16. The IOP practitioners recommended to the Individual that he participate in individualized therapy after discharge from the IOP. Ex. A.

Based on the recommendation of the IOP, the Individual has met with a counselor on at least a bi-weekly basis since September 2021. Tr. at 18; *see also* Ex. D (indicating that the Individual has attended counseling with the counselor since September 2021). According to the Individual, the counseling is focused on stressors in his life and the counselor “hasn’t spoke[n] much on the drinking . . . .” Tr. at 18.

Beginning on September 2, 2021, the Individual attended AA meetings on approximately a weekly basis up to the date of the hearing. Ex. C. The Individual testified that he was an active participant in the AA program and had worked the twelve steps of the AA program. Tr. at 13–14, 40–41. He indicated that he had attempted to form a relationship with a sponsor but did not “know what happened with that . . . .” *Id.* at 14.

On February 2, 2022, the Individual submitted his response to the LOI. Ex. 5 at 27. He represented that he had not consumed alcohol since his August 2021 arrest for DUI. *Id.* at 10. Pursuant to his supervised release, the Individual provided a urine sample for an Ethylglucuronide (EtG) test on

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<sup>5</sup> The report of investigation prepared by OPM indicates that the Individual reported being arrested for violating the terms of parole. Ex. 7 at 68. The Individual subsequently clarified that he was arrested for violating the terms of his probation related to his 2020 DUI. Ex. 5 at 1; Tr. at 44.

August 1, 2022, the results of which were negative for traces of alcohol consumption.<sup>6</sup> Ex. E. The Individual testified at the hearing that he underwent weekly alcohol testing while participating in the IOP. Tr. at 24. The Individual also provided a hair sample for an EtG test on August 5, 2022, the results of which were negative for traces of alcohol consumption.<sup>7</sup> Ex. G; Ex. J.

At the hearing, the Individual testified that he had abstained from alcohol since his 2021 arrest for DUI. Tr. at 17. He indicated that he recognized “the severity of . . . [his] problems and the drinking” and that he intended to abstain from alcohol. *Id.* at 20–21.

## V. ANALYSIS

### A. Guideline G

The Individual’s arrests for DUI, alleged domestic violence after consuming alcohol, and history of binge consuming alcohol justify the LSO’s invocation of Guideline G. Adjudicative Guidelines at ¶ 22(a), (c). Conditions that could mitigate a security concern under Guideline G include:

- (a) so much time has passed, or the behavior was so infrequent, or it happened under such unusual circumstances that it is unlikely to recur or does not cast doubt on the individual’s current reliability, trustworthiness, or judgment;
- (b) the individual acknowledges his or her pattern of maladaptive alcohol use, provides evidence of actions taken to overcome this problem, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations;
- (c) the individual is participating in counseling or a treatment program, has no previous history of treatment and relapse, and is making satisfactory progress in a treatment program; or,
- (d) the individual has successfully completed a treatment program along with any required aftercare, and has demonstrated a clear and established pattern of modified consumption or abstinence in accordance with treatment recommendations.

*Id.* at ¶ 23(a)–(d).

The Individual has established a pattern of avoiding alcohol-related offenses for significant periods of time, most notably the period of more than four years between his October 2015 and January 2020 arrests for DUI, only to reoffend after engaging in binge drinking episodes. This pattern

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<sup>6</sup> An EtG test of a urine sample can usually detect chemical traces of alcohol consumption in which a subject engaged several days prior to the collection date, depending on the cutoff level applied by the laboratory measuring the sample. *See Personnel Security Hearing*, OHA Case No. PSH-21-0071 at 6 (2021) (reflecting the opinion of an expert witness that an EtG urine test could usually detect traces of two alcoholic drinks for up to forty-eight hours following consumption). Decisions issued by OHA are available on the OHA website located at <http://www.energy.gov/OHA>.

<sup>7</sup> The effectiveness of EtG tests of hair samples for detecting alcohol consumption may vary considerably depending on the extent of a subject’s alcohol consumption. *See Personnel Security Hearing*, OHA Case No. PSH-22-0064 at 9 n. 5 (2022) (quoting the testimony of an expert witness that the sensitivity of an EtG hair test is dependent on the amount of alcohol the subject consumed and that “it’s going to more likely pick it up if you drink a lot than if you drink a little”).

indicates that the passage of one year since the Individual's August 2021 arrest is insufficient to conclude that his alcohol-related misconduct is unlikely to recur. Moreover, the Individual's extensive history of alcohol-related offenses indicates that the Individual's alcohol-related misconduct was neither infrequent nor the product of unusual circumstances. Accordingly, I find the first mitigating condition under Guideline G inapplicable. *Id.* at ¶ 23(a).

While the Individual has acknowledged his maladaptive alcohol use, he has not brought forth sufficient evidence of his efforts to overcome his alcohol misuse or modified consumption of alcohol to establish the applicability of the second or fourth mitigating conditions. The Individual did not provide expert testimony or other authority to support that an EtG hair test could reliably detect alcohol consumption in a person like the Individual with a history of engaging in episodic binge drinking rather than heavy, daily alcohol consumption. In light of the uncertain ability of the EtG hair test to capture isolated binge drinking episodes, I assigned minimal weight to the results of the Individual's EtG hair test. *See supra* note 7. The Individual's urine EtG test in August 2022, and self-described testing during his two-month participation in the IOP, do not cover a sufficient period of time for me to conclude that he has established a pattern of modified consumption or abstinence from alcohol since his August 2021 DUI as he claims.

Moreover, while the Individual demonstrated that he completed the IOP and provided sign-in sheets showing that he consistently attended AA, he has not brought forth evidence to establish that he was an active participant in either program or that he has fully complied with their recommendations. In the absence of treatment records or testimony from a practitioner at the IOP, I am unable to conclude whether the Individual merely attended mandatory treatment sessions and made the minimum effort required to complete the IOP or fully engaged with the treatment program, followed all recommendations, and established a foundation for sustainable recovery. Likewise, while the Individual has submitted sign-in sheets to show that he physically attended AA meetings, there is no evidence in the record to support his testimony that he actively participated in meetings, he denied having an active sponsor, and he did not offer testimony from witnesses who could corroborate that he worked the twelve steps of the AA program.

More extensive support for the Individual's claimed abstinence and recovery are critically important because he has committed alcohol-related offenses even after claiming to have controlled his alcohol misuse in the past. Notably, the Individual assured the OPM investigator that he had "learned his lesson" from his January 2020 arrest for DUI and that "there [was] no possibility of a recurrence or continuation of this conduct in the future" just one month prior to his August 2021 arrest for DUI. In the absence of more robust alcohol testing records and corroborating witness testimony from persons who observed the Individual's participation in the IOP and AA, I find that the Individual has not established the applicability of the second and fourth mitigating conditions under Guideline G. Adjudicative Guidelines at ¶ 23(b), (d).

While the Individual established that he is currently attending individualized counseling, he acknowledged that the counseling is not primarily focused on alcohol misuse. As the Individual is not currently enrolled in a treatment program or undergoing counseling specifically for alcohol misuse, I find the third mitigating condition under Guideline G inapplicable. *Id.* at ¶ 23(c).

In light of the Individual's extensive history of binge drinking and alcohol-related offenses, I find that his self-reported abstinence and commitment to avoiding alcohol misuse in the future are insufficient to establish the applicability of the mitigating conditions in light of the limited alcohol testing and lack of witness testimony to support his claims. Accordingly, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline G.

## **B. Guideline J**

The Individual's arrests for DUI, including while on probation for the 2020 DUI offense, alleged acts of domestic violence, and other citations justify the LSO's invocation of Guideline J. *Id.* at ¶ 31(b), (d). Conditions that could mitigate a security concern under Guideline J include:

- (a) so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances, that it is unlikely to recur and does not cast doubt on the individual's reliability, trustworthiness, or good judgment;
- (b) the individual was pressured or coerced into committing the act and those pressures are no longer present in the person's life;
- (c) no reliable evidence to support that the individual committed the offense; or,
- (d) there is evidence of successful rehabilitation; including, but not limited to, the passage of time without recurrence of criminal activity, restitution, compliance with the terms of parole or probation, job training or higher education, good employment record, or constructive community involvement.

*Id.* at ¶ 32(a)–(d).

The Individual's most recent arrest for DUI occurred approximately one year prior to the hearing and reflected the continuation of a pattern by the Individual of reoffending after months or years of avoiding arrests or citations. The Individual's recovery from his alcohol misuse is too uncertain, and too little time has passed, for me to conclude that the Individual will not revert to his prior patterns of behavior. Accordingly, I find the first mitigating condition under Guideline J inapplicable in this case. *Id.* at ¶ 32(a).

The second mitigating condition under Guideline J is inapplicable because the Individual does not assert that he was pressured or coerced into committing criminal conduct. *Id.* at ¶ 32(b). The Individual does not contest that he operated a vehicle while intoxicated and, although he denied committing the domestic violence offenses alleged by the LSO, the issuance of orders of protection against the Individual in favor of multiple women, a court's order that he attend domestic violence intervention group meetings for one year, and the finding of fact by a court that the Individual grabbed Girlfriend B by the throat are sufficient for me to conclude that there is some reliable evidence that the Individual committed the offenses in question. Accordingly, I find the third mitigating condition under Guideline J inapplicable. *Id.* at ¶ 33(c).

As noted above, the passage of one year since the Individual's last instance of criminal conduct is insufficient for me to conclude that he will not reoffend due to his pattern of reoffending after months or years without arrests or citations. Moreover, the Individual violated the terms of his 2020 probation when he was arrested for DUI in August 2021, and it is too early to



conclude that he will successfully abide by the terms of his current supervised release which ends in December 2022. Considering these factors, and in the absence of other positive information demonstrating rehabilitation or reformation, I find the fourth mitigating condition under Guideline J inapplicable. *Id.* at ¶ 33(d).

The Individual's lengthy history of arrests, and the troubling allegations of domestic violence raised against him by multiple women, present significant concerns as to his judgment and reliability. Having concluded that none of the mitigating conditions are applicable in this case, I find that the Individual has not resolved the security concerns asserted by the LSO under Guideline J.

## **VI. CONCLUSION**

In the above analysis, I found that there was sufficient derogatory information in the possession of DOE to raise security concerns under Guidelines G and J of the Adjudicative Guidelines. After considering all the relevant information, favorable and unfavorable, in a comprehensive, common-sense manner, including weighing all the testimony and other evidence presented at the hearing, I find that the Individual has not brought forth sufficient evidence to resolve the security concerns set forth in the Summary of Security Concerns. Accordingly, I have determined that the Individual should not be granted access authorization. This Decision may be appealed in accordance with the procedures set forth at 10 C.F.R. § 710.28.

Phillip Harmonick  
Administrative Judge  
Office of Hearings and Appeals